A

N GANESAN N NARAYANAN v. WAYTHA MOORTHY PONNUSAMY

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
B KAMALUDIN MD SAID JCA
[CIVIL APPEAL NO: N-02(NCVC)(W)-1540-07-2018]
14 JANUARY 2020

C ***TORT:*** *Defamation – Libel – Allegation that article published in newspaper contained defamatory statements against complainant – Whether first defendant responsible for writing, printing, dissemination and publication of article – Whether complainant adduced evidence as to how, where and when first defendant caused publication of impugned article – Whether complainant case mere conjecture – Whether complainant discharged initial burden of proof in proving pleaded case –* D *Failure to call material witness to prove link between first defendant and newspaper – Whether fatal to complainant's case – Whether complainant's case vis-a-vis first defendant proved*

The respondent ('plaintiff') was the Chairman of a Non-Governmental Organisation known as HINDRAF while the appellant ('first defendant') was E formerly the national advisor of HINDRAF. The subject matter of the plaintiff's claim against the defendants was premised on an article titled 'HINDRAF is Splitting Again' published in Tamil Nesan, a Tamil National Newspaper ('the impugned article'). The plaintiff averred that the impugned article was defamatory of the plaintiff. The plaintiff alleged that the first F defendant, together with the newspaper, Tamil Nesan (M) Sdn Bhd ('the second defendant') were responsible for the writing, printing, dissemination and publication of the impugned article and that his reputation as a leader of the Indian Community and HINDRAF, Human Rights Activist and former Deputy Minister had been brought to disrepute and hatred. The G plaintiff commenced the present suit against the first and second defendants. Prior to the trial, the second defendant took out third party proceedings against one K Chandramohan R Kanesan ('K Chandramohaan') who was allegedly the media officer of HINDRAF. Tamil Nesan sought indemnity from K Chandramohan in the event liability was found against it on the ground that it was he who furnished Tamil Nesan with the information and H statements which he obtained from the first defendant. K Chandramohan, however, denied that he was the media officer of HINDRAF and denied any knowledge and involvement with any statement allegedly given by the first defendant. The first defendant's defence was that he clearly denied that he was responsible for the publication of the impugned article, which I undisputedly was done by the second defendant. Specifically, the first defendant pleaded that he did not communicate, make and/or write the statements as alleged in the impugned article to Tamil Nesan; he did not cause and/or procure the publication of the impugned article in Tamil Nesan

and he was not responsible for the composition, publication and circulation of the impugned article. The High Court, after a full trial, allowed the plaintiff's claim against the defendants with costs and dismissed Tamil Nesan's third party claim for indemnity against K Chandramohan. Hence, the first defendant's appeal against the decision of the Judicial Commissioner ('JC'). The issues that arose were (i) whether the plaintiff had failed in discharging his initial burden of proof in proving his pleaded case; (ii) whether the JC's findings were made in reliance on hearsay evidence and did not tally with the rest of the evidence; (iii) whether the purported 'statement' by the first defendant was produced in court; and (iv) whether the findings of the JC were erroneous on various grounds.

Held (allowing appeal with costs)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) The plaintiff must independently establish a 'perfect' case that the impugned article was published or caused to be published by the first defendant. If he failed to do so, his case would fail *vis-a-vis* the first defendant – even if he succeeded against Tamil Nesan. From the facts, it was clear and undisputed that the impugned article was (i) published by Tamil Nesan; (ii) did not state the author of the article; (iii) did not state that the first defendant was the author of the article; (iv) was written in the third person's language and in the form of reportage; and (v) had made reference to some purported comments made by the first defendant but the actual words of the comments purportedly made were not produced *verbatim*. The plaintiff's case was thus one of conjecture when he stated that the impugned article must have been written by the first defendant as it was projected to be so. (paras 37, 39 & 40)

(2) The JC, instead of requiring the plaintiff to satisfy his burden of proof to prove publication of the impugned article by the first defendant, imposed a duty akin to that of strict liability on the first defendant to refute a publication made by another party which purportedly quoted him and if he failed to deny the same, the plaintiff's case was made out and the first defendant was automatically found liable for defamation. This was fundamentally wrong and had absolutely no basis in law. It was for the plaintiff to adduce evidence as to how, where and when the first defendant had caused the publication of the impugned article in Tamil Nesan. It was certainly not converse – that the first defendant must take active steps to contact the newspaper and to demand why the newspaper reported as such. It was also not for the first defendant to explain why he did not refute the plaintiff's notice of demand when there was no legal duty whether statutory nor common law for him to do so. The JC's wholesale adoption of the plaintiff's submission went against the fundamental rules of the law of evidence, presumption of innocence and the imposition of duties on a defendant in defamation that was completely unknown in law. (paras 42, 44 & 45)

(3) The plaintiff could not rely on the evidence of Tamil Nesan as the second defendant to make out his case, even when the evidence was viewed as a whole, the JC's finding that the impugned article was written/caused to be written by the first defendant was based on hearsay evidence which was unproved. The JC's findings were therefore highly unreliable, fraught with inconsistencies and inherently improbable. It was therefore plainly wrong and ought to be reversed. (para 46)

(4) The JC failed to take into account of the fact that two important documentary evidence were never produced in court for scrutiny (i) the purported statement written by the first defendant in English which became the basis of which SD4 did the translation of the article and later published as the impugned article; and (ii) the printed email which was purportedly sent by K Chandramohan to Tamil Nesan that would provide a link between the first defendant and Tamil Nesan. The contradiction in evidence between the witnesses of Tamil Nesan ought to have been considered by JC in determining the probabilities of the case. If indeed there was such an email that would conclusively show that Tamil Nesan merely translated *verbatim* the first defendant's statement, there was no reason why Tamil Nesan would not have produced the same as this was very crucial to the plaintiff's case. The court ought to have either (i) drawn an adverse inference against this version of Tamil Nesan's case; or (ii) disbelieve Tamil Nesan's evidence in this regard; or (iii) accord a low probative value to the same. The failure to produce documentary evidence in support of oral testimony ought to be a reason to disbelieve the latter. (paras 49, 55 & 56)

(5) If it were true that the impugned article was in fact a mere translation of the first defendant's statements, the primary evidence which was the first defendant's statement must be produced in court. Failure to do so would render the oral testimony of the person seeking to put forward this version of the evidence to be inadmissible. In any event, given the weakness of the oral evidence by witnesses of Tamil Nesan, even if this gave rise to more than one inference as to whether or not the impugned article was written based on a purported statement by the first defendant, the sinister inference against the first defendant must be rejected. This court ought to reject the evidence of Tamil Nesan implicating the first defendant. (paras 57-59)

(6) If the plaintiff was seeking to rely on the evidence of the second defendant, as to the origin of the impugned article implicating the first defendant, they ought to have called the third party, K Chandramohan as a witness. K Chandramohan was a material witness as to the plaintiff's case that the impugned article was in fact written or caused to be published by the first defendant, without which the link between the first defendant and Tamil Nesan would break. When Tamil Nesan sought indemnity from K Chandramohan, the latter in his defence to the third

party claim had categorically denied that he was the media officer of HINDRAF. He also denied any knowledge and involvement in any statements allegedly given by the first defendant. This left a gap in the case of the plaintiff *vis-a-vis* the first defendant. This was all the more so when K Chandramohan chose not to appear as a witness in his defence against the third party claim by making a submission of no case to answer and adduced no evidence. (paras 60-62)

(7) The effect of the acceptance of K Chandramohan's submission of no case to answer could only mean that Tamil Nesan's evidence that K Chandramohan was the one who republished the source document written by the first defendant and they had merely translated the same was 'so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.' Given that Tamil Nesan's case against K Chandramohan failed, the only link which connected the first defendant to the impugned article was not proven. It was then incumbent on the plaintiff to call K Chandramohan being a material witness to his case against the first defendant to fill the gap in evidence that it was the first defendant who wrote the impugned article. He failed to do so. Hence, the plaintiff's case *vis-a-vis* the first defendant was therefore also not proven. The JC therefore failed to sufficiently appreciate the evidence and his decision was plainly wrong, warranting appellate intervention. (paras 64-66)

Case(s) referred to:

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Azman Mahmood & Anor v. SJ Securities Sdn Bhd [2012] 6 CLJ 573 FC ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***

Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor [2018] 1 CLJ 145 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Formis Resources Bhd & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals [2016] 9 CLJ 169 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Henderson v. Foxworth Investments Ltd [2014] UKSC 41 ***(refd)***

Jones v. John Skelton [1963] 1 WLR 1362 ***(refd)***

Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***

Lembaga Penggalakan Pelancongan Malaysia v. One Big Option Sdn Bhd [2017] 1 LNS 1566 CA ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Lim Guan Eng v. New Straits Times Press (M) Bhd [2017] 4 CLJ 369 HC ***(refd)***

Lysko v. Braley (2006) 79 OR (3d) 721 ***(refd)***

Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Perunding Alam Bina Sdn Bhd v. Errol Oh & Ors [1999] 2 CLJ 875 HC ***(refd)***

Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors [1999] 8 CLJ 499 HC ***(refd)***

A *S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC* ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 1 LNS 146 HC ***(refd)***
Tan Sri Dato' Seri Halim Mohammad v. Syed Ahmad Tun (Dr) Syed Nasir & Anor
B *[2013] 8 MLJ 348* ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Watt v. Thomas [1947] AC 484 ***(refd)***

For the appellants - Gurdial Singh Nijar, S Thilaga & Abraham Au; M/s S Thilaga
C *For the respondent - S Vengadeswaran; M/s S Vengadeswaran*

[Editor's note: Appeal from High Court, Seremban; Civil Suit No: 23NCVC-03-07-2016 (overruled).]

Reported by Suhainah Wahiduddin

D

JUDGMENT

Kamaludin Md Said JCA:

Introduction

E **[1]** This is the first appellant's appeal against the decision of the learned Judicial Commissioner (the learned JC) given on 9 July 2018. The JC allowed the respondent's defamation claim against the first appellant and Tamil Nesan (M) Sdn Bhd in the court below) and proceeded to grant damages of RM100,000 and costs of RM20,000 each against the appellant
F and Tamil Nesan (M) Sdn Bhd.

[2] From the record, this appeal is only brought by the first appellant in the notice of appeal dated 24 July 2018. Tamil Nesan (M) Sdn Bhd, the second defendant did not appeal against the said decision of the learned JC.

G **[3]** In this appeal, the parties will be referred to as what they were referred to at the High Court as the plaintiff, the first and second defendants and the third party respectively.

[4] We heard the first defendant's appeal. The first defendant's and the plaintiff's counsel had made oral submissions and also referred to their
H written submissions. Having considered the submissions and perused the record of appeal and the grounds of judgment of the learned JC, we found there is merit in the first defendant's appeal. We were unanimous in our decision that the first defendant's appeal ought to be allowed. Hence, we allowed the first defendant's appeal with costs of RM30,000 here and below
I subject to allocator fee. We gave our reasons.

Background Facts

[5] The plaintiff at all material time is the Chairman of a Non-Governmental Organisation known as HINDRAF. The first defendant was formerly the national advisor of HINDRAF. The first defendant resigned from his position in 6 March 2016.

[6] The subject matter of the plaintiff's claim against the defendants is premised on an article titled "HINDRAF is Splitting Again" published in Tamil Nesan, a Tamil national newspaper, on 13 March 2016 (the impugned article).

[7] The impugned article was written in the Tamil language. It was later translated by a Tamil interpreter of the Seremban High Court into English which reads as follows:

> DAILY PRESS - TAMIL NESAN
>
> March 13, 2016 - Tamil Nesan HINDRAF Is Splitting Again.
>
> Hindraf which stood forward without fear has voiced out for the development of socio economic status for the Malaysian Indians appears to have a situation of a major split.
>
> The Hindraf Organisation and their struggle are being diverted by its leader Waytha Moorthy for his own political gains and this has been realised by the superior leaders who had stood as pillars for the past few months informed the Hindraf National Advisor N. Ganesan.
>
> Since his own political benefits are being hindered by some of these superior people of the Organisation who are also opposing his ways, it is said that Waytha Moorthy has appointed his family members as well as his school and college friends in the Central Committee and with their unanimous support he is moving his steps towards fulfilling his political dreams.
>
> When Waytha Moorthy was in London under asylum, many important members in Malaysia were continuing the struggle for Hindraf in Malaysia but now Waytha Moorthy is disregarding them as well as embarked on a defamatory campaign against them in exploitation of the people and their problems towards his search of political gain Waytha Moorthy's real character would be exposed soon.
>
> It is said Waytha Moorthy's conduct has raised major objections amongst the Central Committee members and today the 13th March, 2016 @ 10.00am, at the Annual/General Meeting that to be held at the Chinese Assembly Hall, Kuala Lumpur hence Waytha Moorthy to fulfil his political dreams after appointing his puppets as Central Committee members, there would be another major unavoidable split in Hindraf Organisation states Ganesan regretfully.
>
> (at para. 5(a) of the plaintiff's statement of claim (page 43 to 44 of the rekod rayuan/jilid 1 (bahagian A).

A **[8]** The plaintiff averred that the impugned article is defamatory of the plaintiff as it connotes the adverse meanings as pleaded at para. 8(a) to (q) of the plaintiff's statement of claim.

(at pp. 45 to 46 of the rekod rayuan/jilid 1 (bahagian A).

B **[9]** The plaintiff alleged that the first defendant, together with the newspaper, Tamil Nesan (M) Sdn Bhd, were responsible for the writing, printing, dissemination and publication of impugned article and that his reputation as a leader of the Indian community and HINDRAF, human rights activist and former Deputy Minister had been brought to disrepute and hatred.

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(at pp. 10 and 15 of the plaintiff's statement of claim (pp. 46 to 48 of the rekod rayuan/jilid 1 (bahagian A).

[10] The plaintiff had on 11 May 2016 issued a demand notice to the first defendant. The first defendant on 26 May 2016 replied to the said notice that

D he does not have anything to say on the matter as referred in the notice. He further said that he would "clarify his position and defend his actions in the court of law when it comes to that".

(the plaintiff's letter dated 11 May 2016 at pp. 406-410 and first defendant's

E letter dated 26 May 2016 at pp. 418 of rekod rayuan/jilid 2C (bahagian C).

[11] The plaintiff then commenced the present suit against the first defendant and Tamil Nesan (M) Sdn Bhd on 15 July 2016.

High Court Proceedings

F **[12]** Prior to the trial, the second defendant, Tamil Nesan (M) Sdn Bhd on 28 February 2017 took out third party proceedings against one K Chandramohan a/l R Kanesan (K Chandramohan) who was allegedly the media officer of HINDRAF. Tamil Nesan sought indemnity from K Chandramohan in the event that liability is found against it on the ground

G that it was he who furnished Tamil Nesan with the information and/or statement which he obtained from the first defendant. In view of that, Tamil Nesan argued that it had no knowledge whether or not the information and/ or statement given by K Chandramohan was true or not and it had genuinely believed that the contents of the publication were true.

H (second defendant's statement of claim against third party at pp. 86F-861 of rekod rayuan/jilid 1 (bahagian A)

[13] K Chandramohan, however, denied that he was the media officer of HINDRAF. He also denied any knowledge and involvement with any statement allegedly given by the first defendant.

I (paras. 2, 7, 8, 10 of third party defence against second defendant's statement of claim at pp. 86J-86L of rekod rayuan/jilid 1 (bahagian A)

[14] The crux of the first defendant's defence dated 9 September 2016 against the plaintiff's claim is straightforward. The first defendant clearly denies that he is responsible for the publication of the impugned article which undisputedly was done by the second defendant, Tamil Nesan. Specifically, the first defendant pleaded that:

(i) he did not communicate, make and/or write the statements as alleged in the impugned article to Tamil Nesan;

(ii) he did not cause and/or procure the publication of the impugned article in Tamil Nesan;

(iii) he is not responsible for the composition, publication and circulation of the impugned article.

(the first defendant's defence at para. 6.1, 6.2 and 6.3, p. 69 of rekod rayuan/jilid 1 (bahagian A)

Decision Of The High Court

[15] On 9 July 2018, the High Court after full trial allowed the plaintiff's claim against both defendants with costs. The learned JC however dismissed Tamil Nesan's third party claim for indemnity against K Chandramohan. Tamil Nesan did not appeal against the decision of the High Court.

[16] We had read the grounds of the learned JC and the crux of the learned JC's reasoning are as follows:

(i) Tamil Nesan admitted to printing, publishing and disseminating the impugned article in its newspaper on 13 May 2016. Tamil Nesan also states that the impugned article was made based on information received through its reporters, representatives and/or agents from the first defendant or the purported HINDRAF media officer;

(the grounds of judgment at para. 6 at p. 21 of rekod rayuan/jilid 1 (bahagian A)

(ii) since the first defendant submitted that core issue of this case was whether or not the first defendant had written the impugned article and did not raise the issue of whether or not the first and second elements of libel had been established, there is no dispute that the words in the impugned article are defamatory and referred to the plaintiff. In any event, the plaintiff had proven the first and the second elements in an action for libel that the words are defamatory and referred to the plaintiff;

(the grounds of judgment at paras. 15-16 at pp. 24-25 of rekod rayuan/jilid 1 (bahagian A)

(iii) Upon reading the impugned article as a whole, this court finds that reading the article would give a picture and meaning to an ordinary reader that projects the plaintiff in the manner as described in para. 8 of the SOC. As such, the words are defamatory;

A (the grounds of judgment at para. 17 at p. 25 of rekod rayuan/jilid 1 (bahagian A)

(iv) The impugned article clearly referred to the plaintiff and the said article was published to third parties;

B (the grounds of judgment at paras. 18-19 at pp 25-26 of rekod rayuan/jilid 1 (bahagian A)

(v) Even though the first defendant's name was not stated in the impugned article as the author of the article, the first defendant's name and picture were mentioned and shown in the article and the first C defendant knew of the existence of the impugned article in Tamil Nesan on 13 March 2016. However, the first defendant did not write to Tamil Nesan to state that he did not make the statement in the impugned article. Also after he received the demand notice on 11 May 2016 from the plaintiff's solicitors, he did not refute the statement in D the impugned article. Upon receiving the SOC, the first defendant merely made a bare denial that he did not make or write the statement in the impugned article.

(the grounds of judgment at para. 23 at p. 28 of rekod rayuan/jilid 1 (bahagian A)

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(vi) The plaintiff's witness SP5, in his re-examination stated that the first defendant was the maker of the statement in the impugned article. So do the witnesses from Tamil Nesan. SD3, K Padmanabhan when cross-examined said that the statement sent by K Chandramohan to Tamil Nesan's email mytamilnesan@yahoo.com was in English. SD4 F when cross-examined disagreed that the impugned article was a new article and confirmed that the email contained the same of the first defendant as the informer.

(the grounds of judgment at para. 26 at pp. 29-30 of rekod rayuan/jilid 1 (bahagian A)

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(vii) The statement in the article was in English and issued by the first defendant and sent by the third party, K Chandramohan to Tamil Nesan. SD2 then sent it to SD4 whereby SD4 had translated the statement in the article from English to Tamil as instructed by SD2. H SD4 only translated the statement in the article from English to Tamil and was not the one who wrote the statement in the article.

(the grounds of judgment at para. 27 at p. 30 of rekod rayuan/jilid 1 (bahagian A)

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(viii) Even though the email was not produced in evidence, SD3's testimony confirmed that the statement in the article was made by the first defendant. SD4 also said that the name given in the original statement in English article was that of the first defendant and the email has the

name of the first defendant as the informer and he translated what was in the email. As such, the court found that the first defendant was the one who wrote the statement in the article;

(the grounds of judgment at paras. 29-30 at pp. 30-31 of rekod rayuan/jilid 1 (bahagian A)

(ix) By making reference to the case of *Lim Guan Eng v. New Straits Times Press (M) Bhd* [2017] 4 CLJ 369; [2017] 9 MLJ 622, damages and the sum of RM200,000 is a reasonable award. Payment of the said sum of damages is to be apportioned equally between the first defendant and Tamil Nesan. Costs of RM20,000 to be paid by the first defendant and Tamil Nesan to the plaintiff.

(the grounds of judgment at paras. 32-33 at pp. 31-32 of rekod rayuan/jilid 1 (bahagian A).

The Grounds Of Appeal

[17] The first defendant's grounds of appeal as set out in the memorandum of appeal are as follows:

(i) The learned Judicial Commissioner erred in law and in fact in failing to consider that the plaintiff did not adduce any evidence to prove his pleaded case that the first defendant wrote the article titled "HINDRAF is splitting again", which was published in the Tamil daily Tamil Nesan, on 13 March 2016 ("the impugned article").

(ii) The learned Judicial Commissioner erred in law and in fact in failing to properly evaluate the evidence adduced and relied on by the plaintiff to prove that the first defendant deliberately, falsely and maliciously wrote and/or published and/or caused the publication of false and defamatory statements through the impugned article.

(iii) The learned Judicial Commissioner erred in law and in fact in failing to give sufficient weight to the first defendant's own evidence that the plaintiff assumed the impugned article to have been written by the first defendant, based on the references to the first defendant's name therein.

(iv) The learned Judicial Commissioner erred in law and in fact in failing to consider that the plaintiff failed to discharge his burden of proof on the balance of probabilities in respect of his pleaded case against the first defendant.

(v) The learned Judicial Commissioner erred in law and in fact in relying on the oral testimony of the second defendant's witness (SD4), to conclude that the first defendant wrote a statement in English, which was sent by the third party to the second defendant (to the address mytamilnesan@yahoo.co), notwithstanding that the purported statement in English was not adduced in evidence.

(vi) The learned Judicial Commissioner erred in law and in fact in relying on the oral testimony of SD4, to conclude that the purported statement in English was translated by SD4 into Tamil and was subsequently published by the second defendant as the impugned article, notwithstanding that the purported statement in English was not adduced in evidence.

(vii) The learned Judicial Commissioner erred in law and in fact in relying solely on the oral testimony of SD4, to conclude that the purported statement in English was sent by the third party to the second defendant by email, notwithstanding that the purported email was not adduced in evidence.

(viii) The learned Judicial Commissioner erred in law and in fact in relying on the oral testimonies of SD3 and SD4, to conclude that the purported statement in English formed the basis of the impugned article.

(ix) The learned Judicial Commissioner erred in law and in fact in relying on the second defendant's version as to the publication of the impugned article to attach liability for defamation to the first defendant.

(x) The learned Judicial Commissioner erred in law and in fact in failing to consider or consider adequately the material contradictions in the testimonies of SD2, SD3 and SD4 (the second defendant's witnesses) in relation to the statement allegedly written by the first defendant.

(xi) The learned Judicial Commissioner erred in law and in fact in holding that the first defendant's failure to refute and/or rebut the references made to him in the impugned article, implied that the impugned article was written based on the statement allegedly written by the first defendant.

(xii) The learned Judicial Commissioner erred in law and in fact in inferring, from the contents of the first defendant's written response to the letter of demand issued by the plaintiff's solicitors, that the impugned article was written by the first defendant.

(xii) The learned Judicial Commissioner erred in law and in fact in holding that the first defendant is the author of the impugned article based on inference, in the absence of any evidence to link the first defendant to the impugned article and notwithstanding SD4's testimony that the impugned article was written by SD4.

(xiv) The learned Judicial Commissioner erred in law and in fact in failing to consider that the plaintiff's pleading in relation to the impugned article is defective and the subject matter in relation thereto is not actionable *per se*.

(xv) The learned Judicial Commissioner erred in law and in fact in failing to consider the effect of the dismissal of the case against the third party *vis-a-vis* the plaintiff's claim.

(xvi) The learned Judicial Commissioner erred in law and in fact in finding the first defendant is liable for defamation based on the impugned article and in ordering the first defendant to pay damages in the sum of RM100,000 with costs of RM20,000 to the plaintiff.

Appellate Intervention

[18] It is trite law that an appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence. The appellate court will intervene in a case where the trial court had so fundamentally misdirected itself (See: *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064). The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 reiterated the principle to be adopted by an appellate court when reversing findings of fact by a trial court: "... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (at p. 10) per Steve Shim CJ SS. More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p. 800: "It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41b; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309."

[19] The Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence. The Federal Court further stated that a court hearing the appeal is entitled to reverse the decision of the trial judge after making its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case. It is also entitled to examine the process of evaluation of the evidence by the trial court and reverse a decision if it is wrong.

[20] The failure to consider the entirety of the evidence and material issues or the failure to make findings of fact or the making of bare findings of fact will invite appellate intervention. Such omissions by a trial judge will require the appellate courts to take on the role of first instance judge and review the evidence in its entirety afresh.

[21] Having set out the legal principles underlying appellate intervention, we investigate the evidence given during the trial found in the records of appeal and made our assessment whether the finding of facts by the learned JC in this case contained appealable error for this court to interfere.

[22] We heard the submissions from the first defendant's and also from the plaintiff's counsel. Counsel were also relying on their written submission filed herein respectively. We thank counsel for their good and able submissions. We had considered the submissions.

Applicable Law On Defamation - Libel

[23] The case at the court below involved defamation claim. It was unnecessary for us to repeat the established law of defamation herein in our judgment but suffice for us to rely on parties' submission which we agreed on the established law found in numerous cases cited in the written submissions. We agreed that the procedure in establishing a claim on libel has been well illustrated in the leading case of *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; [1989] 1 MLJ 315 where Mohamed Dzaiddin J (as he then was) said:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he had made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged.

In other words, the plaintiff must prove three elements of the tort of defamation, which are:

(i) the plaintiff must show that the statement bears defamatory imputations;

(ii) the statement must refer to or reflect upon the plaintiff's reputation; and

(iii) the statement must have been published to a third person by the defendant.

[24] Other relevant cases illustrating the underlying principles in defamation cases can also be found in the cases cited by parties *inter alia* the cases of *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor*

[1973] 1 LNS 146; [1973] 2 MLJ 56: *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32; [2002] 7 MLJ 283; *Chok Foo Choo @ Chok Kee Lian v. The China Press Bhd* [1999] 1 CLJ 461; [1999] 1 MLJ 371; *Perunding Alam Bina Sdn Bhd v. Errol Oh & Ors* [1999] 2 CLJ 875; [1999] 6 MLJ 101; *Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors* [1999] 8 CLJ 499; [1999] 3 MLJ 529; *Tan Sri Dato Seri Halim Mohammad v. Syed Ahmad Bin Tun (Dr) Syed Nasir & Anor* [2013] 8 MLJ 348; *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173, *Jones v. John Skelton* [1963] 1 WLR 1362 (Privy Council).

[25] The courts had held that whether the words complained of, are defamatory laid on the nature of the statement in that it must have a tendency to affect the reputation of a person. The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning, any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. Hence, the test to be applied to determine whether the words complained of are defamatory, is an objective one.

[26] In the present case, the learned JC had referred to the applicable authorities and applied the correct law. We had no problem with the learned JC's judgment as far as the established law is concerned. The learned JC had dealt with the defamatory press news and publication. We were in agreement with his finding that the said alleged defamatory statements were clearly defamatory of the plaintiff. The words referred to or were meant to be directed to the plaintiff.

[27] The learned JC found that the contents of the alleged defamatory statements bore the meaning in the manner illustrated by the plaintiff in the statement of claim. In other words, the defamatory press news and publication of the plaintiff had tarnished his character, credibility and reputation both personal and business, and also the offices held by him thereby bringing about hatred, public scandal and contempt. It also meant that the publication of the said defamatory statements concerning the plaintiff had caused mental anguish, distress, anxiety and embarrassment to the plaintiff. The words attacked the moral, character of the plaintiff attributing dishonesty, untrustworthy, greed, and conspiracy and or collusion. The alleged defamatory statements, the words used to its ordinary meaning imply to the ordinary reasonable man the meaning as illustrated by the plaintiff in the statement of claim.

[28] Be that as it may, what we had said and agreed in the above paragraphs were only applicable in the event if we dismissed the first defendant's appeal. By not appealing against the learned JC's decision, the second defendant must be presumed to have accepted the said decision. We were not concerned with the decision against the second defendant in the court below. However, this is the first defendant's appeal against the learned JC's decision which had

A allowed the plaintiff's defamation claim against the first defendant. In other words, the first defendant in the court below and in this appeal maintains his stand that the defamatory statements concerning the plaintiff had nothing to do with him and the finding of the learned JC implicating him is erroneous on various grounds.

B **The Appeal**

[29] The first defendant at the outset, submitted that the learned JC had clearly committed a material error of law and misconstrued the evidence in the following aspects:

C (i) The learned JC committed a fundamental error of law *vis-a-vis* the established law of pleadings in a claim of libel by allowing the plaintiff's claim against the first defendant despite the fact that the plaintiff did not plead the actual words purportedly written by the first defendant;

(ii) The learned JC committed a fundamental error of law *vis-a-vis* the law D of evidence in any case that it is the plaintiff who must first prove his case before the burden is shifted to the first defendant to refute the same;

(iii) The learned JC failed to take cognisance of the fact that the impugned article is an entirely new article written by SD4 in his own words in Tamil and did not cite the first defendant's words in *verbatim* or at all; E

(iv) The learned JC failed to judicially and properly appreciate the evidence and consider the probabilities of the plaintiff's case when he accepted the oral testimonies of SD2, SD3 and SD4 that the impugned article was written based on a purported statement by the first defendant sent to Tamil Nesan without having regard to the following crucial facts that: F

(a) witnesses on behalf Tamil Nesan, in particularly SD4, who wrote the impugned article, failed to produce the purported statement or even the covering email which was purportedly forwarded to Tamil Nesan by one K Chandramohan who was allegedly the media officer G of HINDRAF;

(b) the third party, K Chandramohan, had denied forwarding any statement to Tamil Nesan nor any involvement in relation thereto;

(c) a perusal of the constitution and the list office bearers of HINDRAF would show that there is no such position of a "media officer" in H HINDRAF.

(v) The learned JC failed to make any evaluation at all as to whether or not the impugned statement is defamatory within the meanings as pleaded by the plaintiff in para. 8 of his SOC.

I **[30]** The plaintiff submitted that the learned JC had made a correct decision and also replied to the first defendant's submission and also relied on the written submission. For all the reasons submitted, the plaintiff

submitted that there are no errors of law or fact committed by the learned JC to merit this court's intervention and prayed that the learned JC's decision is affirmed and the appeal is dismissed with costs.

[31] We had considered the plaintiff's submissions. However, we must first investigate whether the complaints raised by the first defendant merit consideration or whether the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.

[32] Before we investigate the first defendant's complaint, we looked at the first defendant's statement of defence (defence). The first defendant in his pleaded defence dated 9 September 2016 has taken a stand that he denies ever making the defamatory press news statement. At this juncture, in our considered view, it is the plaintiff who must prove his case before the burden is shifted to the first defendant to refute the same.

The Plaintiff's Failure In Discharge His Initial Burden Of Proof In Proving His Pleaded Case

[33] We were of the view that in the event the first defendant was able to convince us that the plaintiff had failed to discharge his initial burden of proof in proving his pleaded case, it clearly warrants appellate interference.

[34] It is the plaintiff's pleaded case that the defendants had deliberately, falsely and with malicious intent written and/or disseminated and/or cause to be disseminated defamatory words which are false and/or untrue as against him. The relevant parts of the pleading are as follows:

> Melalui Tamil Nesan tersebut bertarikh 13hb March 2016 Defendan-Defendan telah dengan sengaja, secara palsu dan dengan niat jahat (malice) telah menulis dan/atau menyiarkan dan/atau menyebabkan disiarkan pengataan-pengataan yang palsu dan tidak benar yang berunsur fitnah dan berkenaan dengan plaintif atau mengenai plaintif sepertimana yang terdapat di dalam appendiks A yang dikepilkan bersama ini

(para. 4 of plaintiff statement of claim at p. 42 rekod rayuan/jilid 1 (bahagian A)

[35] In other words, the plaintiff states that the first defendant was responsible for the publication of the impugned article. It is therefore incumbent on the plaintiff, to prove on a balance of probabilities that the first defendant was responsible for causing the publication of the same. We agreed with the first defendant that the burden of proof rests on the plaintiff throughout the case. Only after the plaintiff discharges the burden, the evidential burden shifts to the first defendant.

[36] We referred to the Federal Court in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697 at 456-457 (CLJ); 739-740 (MLJ), paras. 54 and 56 (ABOA/tab 4) where it was held:

A [54] Section 101(1) provides that 'Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. 'Section 101 states that the initial burden of proving a *prima facie* case in his favour is cast on the plaintiff ...' (Woodroffe and Amir Ali, *Law of Evidence* (19th Ed Vol 3) at p 3194). Illustration (b) to s 101 puts it beyond doubt that the B 'burden of proof' rests throughout on the plaintiff. Section 102 provides that 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'. 'The initial onus of proving the case is always on the plaintiff' (*Sarkar Law of Evidence* 16th Ed at p 1593). Illustration (a) to s 102 puts it beyond doubt that a plaintiff has the initial onus of proof ...

C

[56] Thus, a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:

D

> ... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case E may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been F discharged by the plaintiff. The legal burden of proof - a permanent and enduring burden - does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party hears the legal burden of G proof.

[57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit*, *non qui negat*, *Actori incibit* probation. The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court H will not assist him. Hence the maxim *potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in I his turn, is bound to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor*' (*Woodroffe and Amir Ali*, Vol. 3 at pp 3190-3191).

[37] In this case, we noted that the crux of the first defendant's defence is only on the ground that he did not cause the publication of the impugned article. He also denied any involvement *vis-a-vis* the impugned article. The first defendant did not raise any specific defences such as justification of fair comment. As such, on the authorities cited by the first defendant, we agreed with him that it is clear that the plaintiff cannot rely on any purported "failure to refute" on part of the first defendant as the basis to prove his own case. It is our considered view that the plaintiff in this case must independently establish a "perfect" case that the impugned article was published or caused to be published by first defendant. If he fails to do so, his case would fail *vis-a-vis* the first defendant - even if he succeeds against Tamil Nesan.

[38] The Ontario Court of Appeal in *Lysko v. Braley* (2006) 79 OR (3d) 721 Ont at para. 94 held as follows:

> [94] In this case, if the appellant proves the facts pleaded, he will not have made out a *prima facie* case. Proving that one or more of a group of four people, not alleged to be acting in concert and not alleged to otherwise to be responsible for each other's actions, defamed the plaintiff, does not make out a case against any of them. Absent proof of vicarious liability or actions in concert, we do not make individuals liable for the anonymous acts of others.

[39] From the facts, it is clear and undisputed that the impugned article:

(i) was published by Tamil Nesan;

(ii) did not state the author of the article;

(iii) did not in anywhere state that the first defendant was the author of the article;

(iv) was written in the third person's language and in the form of reportage;

(v) on two brief occasions made reference to some purported comments made by the first defendant but the actual words of the comments purportedly made by the appellant were not produced in *verbatim*.

[40] We agreed with the first defendant that the plaintiff's case is one of conjecture when the plaintiff stated that the impugned article must have been written by the first defendant as it was projected to be so. Specifically, his reasons are as follows:

(i) the first defendant did not immediately deny making the alleged statement after receiving the demand notice;

(ii) the first defendant was quoted in the impugned article;

(iii) a photograph of him appeared beside the impugned article; and

(iv) people around him purportedly questioned him why the first defendant issued the statement.

(SP-5's witness statement at p. 109, Q&A 18, rekod rayuan/jilid 2A (bahagian B)

(cross-examination of SP5 at pp. 206-207, lines 30-10, rekod rayuan/jilid 2A (bahagian B)

[41] The learned JC accepted the plaintiff's flimsy and surmising statement and found as a fact that it was the first defendant who wrote the impugned article. The learned JC held that even though the impugned article did not state the name of the author, the impugned article displayed the first defendant picture and his name was quoted:

> Sungguhpun nama defendan pertama tidak tertera sebagai penulis artikel tersebut, tetapi artikel tersebut tertera gambar dan nama defendan pertama. Defendan pertama (SD1) bersetuju dengan peguamcara plaintif bahawa artikel tersebut mempunyai gambar dan juga menyebut Namanya. Defendan pertama mengetahui kewujudan artikel tesebut dalam akhbar Tamil Nesan yang telah ditunjukkan kepadanya pada 13 Mac 2016 yang mana tertera gambar dan namanya. Namun begitu defendan pertama tidak menulis kepada defendan kedua untuk menyatakan tidak membuat pernyataan dalam artikel tersebut. Dan selepas menerima notis tuntutan bertarikh 11 Mei 2016 daripada peguamcara plaintif, defendan pertama mempunyai peluang untuk menyangkal pernyataan dalam artikel tersebut yang mana tertera gambar dan Namanya walau bagaimanapun defendan pertama gagal untuk berbuat demikian tetapi memilih untuk menjawab kepada peguamcara plaintif dengan menyatakan:
>
> > I do not have anything to say on the matter that you have referred to in your notice at this stage. I will clarify my position and defend my actions in the court of law, when it comes to that.
> >
> > Defendan pertama langsung tidak menafikan membuat pernyataan dalam artikel tersebut ...

(High Court judgment at pp. 27-28 at para 23, rekod rayuan/jilid 1 (bahagian A)

[42] In view of the above finding, we agreed with the first defendant's contention that the learned JC instead of requiring the plaintiff to satisfy his burden of proof to prove publication of the impugned article by the first defendant, imposed a duty akin to that of strict liability on the first defendant to refute a publication made by another party which purportedly quotes him and if he fails to deny the same, the plaintiff's case is made out and the first defendant is automatically found liable for defamation. The first defendant is absolutely right that this is fundamentally wrong and absolutely has no basis in law.

[43] In our view, the legal proposition closest to what was suggested by the learned JC is the duty to seek verification in reportage cases that imposed on persons who wish to invoke the defence of qualified privilege. In that regard,

it is generally accepted that as part of responsible journalism, the news publisher is under a duty to first check with the plaintiff as to the truth of the statement that it intends to report.

(See: *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor* [2018] 1 CLJ 145; [2017] 6 MLJ 133 at 173, para. 57)

[44] It is also our view that the pleaded fact in the present case is entirely different. The first defendant is not relying on the defence of reportage nor qualified privilege. The first defendant's pleading denies at the outset that he was the one responsible for the publication. We agreed that it is for the plaintiff to adduce evidence as to how, where and when the first defendant had caused the publication of the impugned article in Tamil Nesan. It is certainly not the converse - that the first defendant must take active steps to contact the newspaper and demand why the newspaper reported as such. It is also not for the first defendant to explain why he did not refute the plaintiff's demand notice when there is no legal duty whether statutory nor common law for him to do so.

[45] The first defendant submitted that the learned JC's wholesale adoption of the plaintiff's submission goes against the fundamental rules of the law of evidence, presumption of innocence and the imposition of duties on a defendant in a defamatory that is completely unknown in law. This is a material error of law that must be corrected. We agreed with this submission.

The Learned JC's Findings Were Made In Reliance On Hearsay Evidence And Do Not Tally With The Rest Of The Evidence

[46] We agreed with the first defendant's careful argument that the plaintiff cannot rely on the evidence of Tamil Nesan as the second defendant to make out his case, even when the evidence is viewed as a whole, the learned JC's finding that the impugned article was written/caused to be written by the first defendant is based on hearsay evidence which was unproven. We also agreed that the learned JC's findings are therefore highly unreliable, fraught with inconsistencies and inherently improbable. It is therefore plainly wrong and ought to be reversed.

Purported "Statement" By The First Defendant Was Never Produced In Court

[47] At the outset, when we were informed that the purported 'statement' by the first defendant was never produced in court, we were surprised that how can it be so because the statement was supposed to be the fundamental evidence which the plaintiff was relying on. It was our preliminary view that if that is so, then the plaintiff's case against the first defendant will totally collapse. We asked the first defendant to further explain his case. Upon given the explanation and perusal of the record of appeal and the grounds of judgment of the learned JC, we accepted that the explanation has merit.

[48] First, the learned JC accepted the respondent's contention that the impugned article was written based on a statement given by the first defendant to one K Chandramohan being the media officer of HINDRAF who later sent the said statement by email to Tamil Nesan at its email address of mytamilnesan@yahoo.com. The chief editor, SD3, then upon receiving the email, instructed SD4, to write the impugned article. SD4's position is that he merely translated what was given to him from English to Tamil and that he never varied or changed anything in the statement. The learned JC accepted the oral evidence of SD4 wholesale without examination.

(High Court judgment at pp. 29-30 at paras. 26-27 rekod rayuan/jilid 1 (bahagian A)

[49] Based on the above finding, we agreed that the learned JC failed to take into account of the fact that two important documentary evidence were never produced in court for scrutiny: (a) the purported statement written by the first defendant in English which became the basis of which SD4 did the translation and later published as the impugned article; (b) the printed email which was purportedly sent by K Chandramohan to Tamil Nesan that would provide a link between the first defendant and Tamil Nesan.

[50] In evidence, SD4 on behalf of Tamil Nesan admitted to be the author of the impugned article. However, in his attempt to minimise his liability, he completely downplayed his role to that of a mere translator of the purported statement which he alleged was given to him by SD3, his superior, the chief editor, despite the fact that he was of the view that the purported statement - the source document and the best evidence to prove that the impugned article was a mere translation of a purported statement authored by the first defendant was an important document:

S: Jadi maklumat yang anda terima berhubung dengan artikel ini pun semestinya penting

J: Penting

S: Tapi tiada di hadapan mahkamah Betul? Tidak dikemukakan di hadapan mahkamah.

J: Artikel itu saya serahkan kepada boss saya.

S: Maklumat itu tidak ada di hadapan mahkamah. Setuju atau tidak setuju?

J: No answer.

S: Berbalik kepada isu menulis. Saya cadangkan kepada encik, kita ada A iaitu maklumat yang kita terima. Katakan maklumat yang anda terima kita tandakan sebagai A. Kita ada B di hadapan mahkamah. Dan encik kata ini encik yang tulis.

J: Dalam itu, ada artikel yang atas itu bukan saya yang tulis.

S: Kita tandakan ini sebagai B. A tidak ada di hadapan mahkamah. Yang ada B sahaja. Macam mana kita hendak bandingkan berapa banyak daripada A itu kamu ambil dan tulis sebagai B. Tidak ada bukti?

J: Tidak ada bukti.

(SP5's cross-examination at pp. 354-355, lines 5- 20, rekod rayuan/jilid 2A (bahagian B)

[51] The first defendant submitted that the chief editor in his desperate attempt to explain his failure to produce the purported statement and/or the email said in his witness statement that the said email cannot be retrieved and produced in court as there were a large number of emails coming in at that time and as a matter of practice, Tamil Nesan would not keep its emails for more than three weeks before deleting them.

(SD3's witness statement at pp. 127, Q&A 16-18 rekod rayuan/jilid 2A (bahagian S)

[52] His evidence, however, was immediately contradicted in entirety by his colleague, SD4, who admitted that he wrote the impugned article. SD4 in no uncertain terms said that the information given to him by SD3 to write the impugned article was in printed form. As such, whether or not the emails were deleted does not matter:

S: Di soalan dan jawapan no. 11, encik kata artikel tersebut ditulis oleh saya berdasarkan maklumat yang diterima oleh pihak dari pihak ketiga. Di mana maklumat?

J: Maklumat saya tiada.

S: Bagaimana encik mahu mahkamah percaya artikel yang anda tulis itu adalah berdasarkan maklumat yang diterima daripada pihak ketiga?

J: Apa yang saya terima daripada boss adalah email, dia punya pencetakan. Itu sahaja.

S: Mana email itu? Sebab encik kata ada nama En. Ganesan atas email itu. Mana email itu?

J: Email saya tidak ada sekarang.

(SD4's cross-examination at pp. 353, lines 20-30 rekod rayuan/jilid 2B (bahagian B)

[53] Furthermore, SD4 also admitted that for the last 1.5 years prior to the publication of the impugned article, there were not many emails that he saw and received from his superior. This again casts doubt as to the veracity of SD3's evidence that emails came in in large number to justify his failure to produce the purported email as they were deleted:

S: Berapa banyak email yang sudah encik lihat antara September 2014 sehingga 13 March 2016?

A J: Tidak banyak. Apa yang saya terima adalah daripada boss. Tak berapa banyak.

(SD4's cross-examination at pp. 354, line 5 rekod rayuan/jilid 2B (bahagian B)

B **[54]** When queried further as to why he did not produce the information that he "merely translated" in penning up the impugned article in Tamil, he said that he had given back the article to his superior - even though his superior had earlier testified that he had deleted the email and ever kept a copy:

C S: Tapi tiada di hadapan mahkamah. Betul? Tidak dikemukakan di hadapan mahkamah.

J: Artikel itu saya serahkan kepada boss saya.

S: Maklumat itu tidak ada di hadapan mahkamah. Setuju atau tidak setuju?

D J: No answer.

(SD4's cross-examination at pp. 355, line 5 rekod rayuan/jilid 2B (bahagian B)

[55] Based on the submission and evidence shown above, we accepted the E first defendant's explanation that the contradiction in evidence between the witnesses of Tamil Nesan ought to have been considered by the learned JC in determining the probabilities of the case. If indeed there was such an email that would conclusively show that Tamil Nesan merely translated in *verbatim* the first defendant's statement, there is no reason why Tamil Nesan would F not have produced the same. We considered that this is very crucial to the plaintiff's case.

[56] In such a situation, we agreed with the first defendant that the court ought to have either (a) drawn an adverse inference against this version of Tamil Nesan's case; or (b) disbelieve Tamil Nesan's evidence in this regard; G or (c) accord a low probative value to the same. The Court of Appeal in *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611 at 623; [2007] 2 MLJ 229 at 238 cited by the first defendant found that the failure to produce documentary evidence in support of oral testimony to be a reason to disbelieve the latter:

H [53] Even if Ramlan had in fact been the maker of the audited statements of account, it is still incumbent upon him to produce the books of account upon which the audited statements were based (see *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 2 MLJ 627 and *Popular Industries Ltd v. Eastern Garment* [1989] 3 MLJ 360).

I [54] It was submitted by the appellant's counsel that the said audited statements of account are inadmissible by virtue of the respondent's failure to comply with Evidence Act 1950 s. 64 requiring that when documentary evidence is tendered, primary evidence of the document ie the production of the documents itself is essential.

[55] Mohamed Dzaiddin SCJ (as he then was) in *KPM Khidmat Sdn Bhd v. Tev Kim Suie* [1994] 2 MLJ 627 observed thus (at p 631):

> when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s 65 of the Evidence Act 1950.

This appears to be the correct legal position.

[57] In our considered view, if it is true that the impugned article is in fact a mere translation of the first defendant's statement, the primary evidence which the first defendant's statement must be produced in court. Failure to do so would render the oral testimony of the person seeking to put forward this version of the evidence to be inadmissible.

[58] We also agreed with the first defendant that in any event, given the weakness of the oral evidence by witnesses of Tamil Nesan, even if this gives rise to more than one inference as to whether or not the impugned article was written based on a purported statement by first defendant's, the sinister inference against the first defendant must be rejected. The Court of Appeal in *Formis Resources Bhd & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals* [2016] 9 CLJ 169; [2016] 6 MLJ 73 at 189-190 (CLJ); 93 (MLJ), para 52 held:

> [53] But, given that the above circumstances, events and matters are construed and inferred by the learned High Court judge as amounting to a scheme with fraudulent overtones when these are in fact ordinary transactions and decisions of business and commerce, with respect, we are unable to see how that inference and conclusion can be safely and reasonably drawn by the learned judge. These same circumstances, events and matters occurred over a period of time well before the plaintiff and the 12th defendant were in contract; and certainly these events are unrelated to the award. There is no evidence that the defendants, any of them, knew what the award would be. There is nothing untoward Jet alone sinister in the first defendant or the directors knowing of the arbitration or that an award would be rendered. Knowledge of these matters is not and does not amount in law to intent to defraud or commit any of the torts complained of. More is required and there is no evidence of any degree before the trial court for the learned High Court judge to conclude as he did. These events and matters are capable of more than one inference. Where that is the case, the sinister inference cannot be preferred without more even where the burden is one on a balance of probabilities. The Court of Appeal had expressed to this effect in *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153 at p 177:
>
> > It is well established that when two inferences are equally open from the same set of facts, the sinister inference is not preferred.

[59] Hence, we had no reason to disagree with the first defendant's submission that this court ought to reject the evidence of Tamil Nesan implicating the first defendant.

K Chandramohan Was Never Called As A Witness By The Plaintiff And His Submission Of No Case To Answer Was Accepted By The Learned JC

[60] The first defendant submitted another valid ground which we think is very crucial to the plaintiff's case. We agreed with the ground submitted that the important aspect of the case which the learned JC ought to have assessed and balanced is the fact that if the plaintiff is seeking to rely on the evidence of the second defendant as to the origin of the impugned article implicating the first defendant, they ought to have called the third party, K Chandramohan as a witness. This is because K Chandramohan is a material witness as to the plaintiff's case that the impugned article was in fact written or caused to be published by the first defendant, without which the link between the first defendant and Tamil Nesan would break.

[61] The evidence shows that when Tamil Nesan sought indemnity from K Chandramohan, the latter in his defence to the third party claim had categorically denied that he was the media officer of HINDRAF. He also denied any knowledge and involvement with any statement allegedly given by the first defendant.

(defence of the third party at pp. 86J-86L, paras 2, 7, 8, 10, rekod rayuan/ jilid 1 (bahagian A)

[62] Based on the above evidence, this leaves a gap in the case of the plaintiff *vis-a-vis* the first defendant. This is all the more so when K Chandramohan chose not to appear as a witness in his defence against the third party claim by making a submission of no case to answer and adduced no evidence. The learned JC accepted the submission and dismissed Tamil Nesan's third party claim. The learned JC did not mention anything on third party neither any reason given on the dismissal in his grounds of judgment. We were of the view that the learned JC had misdirected himself.

[63] The Court of Appeal had recently in *Lembaga Penggalakan Pelancongan Malaysia v. One Big Option Sdn Bhd* [2017] 1 LNS 1566; [2018] 1 MLJ 465 at 472-473 set out the effect of a submission of no case to answer:

> No case to answer
>
> [15] On the effect of a submission of no case to answer, we are guided by the decision of the apex court in *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Nairn* [2015] 2 CLJ 1037; [2015] 3 MLJ 609. In dealing with the issue of whether the appellate court can and ought to disturb findings of fact reached by the trial court where the evidence led by the plaintiff are assumed to be true when the defendant elected not to call any witnesses, the Federal Court made the following observations at p 1059 (CLJ); p 617 (MLJ):
>
> > [56] ... The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (see Gan *Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 10; and *UEM Group Genisys Integrated*

Engineeris Pte Ltd & Anbor [2010] 9 CLJ 785). And, the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v. El Du Pont De Nemours and Company* [2011] 1 LNS 16; [2011] MLJU 1135; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well founded before the court grants judgment on the claim (see *The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v. Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 CLJ 605; [2000] 1 MLJ 449; *Maju Holdings Sdn Bhd v. Fortune Wealth (HK) Ltd & Other Appeals* [2004] 4 CLJ 282; [2004] 4 MLJ 105 and *Teh Swee Lip v. Jadewell Holdings Sdn Bhd* [2014] 8 CLJ 451; [2013] 6 MLJ 32). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant Jed no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in Law. In this regard, in adopting the approach of the case of *Storey v. Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369; [2008] 3 MLJ 81 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[64] Based on the above-said, it is our considered opinion that the effect of the acceptance of K Chandramohan's submission of no case to answer could only mean that Tamil Nesan's evidence that K Chandramohan was the one who republished the source document written by the first defendant and they merely translated the same was, to quote the words of Lord Omerod in *Storey v. Storey*, "so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged".

[65] We agreed with the first defendant that given that Tamil Nesan's case against K Chandramohan failed, the only link which connects the first defendant to the impugned article is unproved. It is then incumbent on the plaintiff to call K Chandramohan being a material witness to his case against

A the first defendant to fill the gap in evidence that it was the first defendant who wrote the impugned article. He failed to do so. Hence, the plaintiff's case *vis-a-vis* the first defendant is therefore also unproved.

[66] We had made careful investigation on the first defendant's complaint and based on the grounds submitted herein and the evidence before us, it is
B our finding that the learned JC had therefore failed to sufficiently appreciate the evidence and his decision is plainly wrong, warranting appellate intervention.

[67] As we had alluded to earlier, an appellate court is entitled to examine the process of evaluation of the evidence by the trial court to see if:
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(i) It amounts to an insufficient judicial appreciation of evidence;

(ii) Crucial evidence is misconstrued - resulting in uncertainty on one party's evidence - and the consistency of the other party's evidence being disregarded.

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(*Azman Mahmood & Anor v. SJ Securities Sdn Bhd* [2012] 6 CLJ 573; [2012] 6 MLJ 1 at 12, para 25)

[68] Reference is also made to the recent English Supreme Court case of *Henderson v. Foxworth Investments Ltd* [2014] UKSC 41 at para. 67 where
E Lord Reid summarised the instances warranting appellate interference as follows:

> It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or
F a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

Conclusion

G **[69]** In conclusion, we found that this is a classic case where the learned JC had failed to apply the correct position of the law and also failed to sufficiently appreciate the evidence before him. In the circumstances, this is a fit and proper case for this court to intervene to correct the decision which is plainly wrong.

H **[70]** It is our unanimous decision that the first defendant's appeal is allowed with costs of RM30,000 here and below subject to allocator fee.

[71] We did not think that it is necessary for us to deal with other grounds submitted by the first defendant.

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